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April 15, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C.

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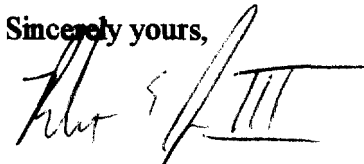
Re: In the Matter of Preemption of local Zoning and Regulation of Satellite
Earth Stations, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93.

Dear Mr. Caton:

Enclosed please find the original and four copies of the Petition for Clarification
and Comments of AlphaStar Television Network, Inc. in the above-captioned proceeding.

Thank you for your attention in this matter.

Sincerely yours,



Robert E. Jones, III

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Preemption of Local Zoning
Regulation of Satellite Earth Stations

)
) IB Docket No. 95-59
) DA 91-577
) 45-DSS-MISC-93
)
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**PETITION FOR CLARIFICATION
AND COMMENTS OF
ALPHASTAR TELEVISION NETWORK, INC.**

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Counsel for AlphaStar Television
Network, Inc.

April 15, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)	
In the Matter of)	IB Docket No. 95-59
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Regulation of Satellite Earth Stations)	
_____)	

**PETITION FOR CLARIFICATION
AND COMMENTS OF
ALPHASTAR TELEVISION NETWORK, INC.**

Pursuant to the Report and Order and Further Notice of Proposed Rulemaking ("Order" and "Further Notice" respectively) in the above-captioned proceeding, released on March 11, 1996, AlphaStar Television Network Inc. ("AlphaStar") hereby submits this Petition for Clarification and Comments.

I. INTRODUCTION

AlphaStar is a Connecticut based provider of direct-to-home ("DTH") satellite television services. AlphaStar commenced the provision of direct-broadcast-satellite ("DBS") programming in April, 1996 utilizing a medium-powered Ku-Band satellite (AT&T's 402R satellite) and a receiving dish measuring between 24 and 30 inches. Because State, local, and private restrictions on satellite dishes will have a profound effect on the DBS industry, and AlphaStar in particular, AlphaStar has a substantial interest in

the Federal Communications Commission's ("Commission" or "FCC") proceedings in this matter.

AlphaStar wishes to commend the Commission for the steps it has taken to strengthen the preemption policy first set forth in 1986 and on the speed with which it has implemented section 207 of the 1996 Telecommunications Act.¹ Section 207 instructs the Commission to implement regulations "that prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."² This section is further clarified by the House Committee Report on the Act which states that the section is intended "to preempt enforcement of State or local statutes and regulations, or State or local legal requirements; or restrictive covenants or encumbrances. . . . Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners association rules, shall be unenforceable to the extent contrary to this section."³ The actions taken by the Commission will go a long way in enforcing Congressional intent and in ensuring that DBS becomes a viable and important competitor to existing video delivery systems.

II. COMMISSION SHOULD ADOPT A WAIVER-ONLY APPROACH

In paragraph 59 of its Order, the Commission asked for comment on whether there is any other procedural mechanism that would be more effective in furthering Congressional concerns about DBS than the presumption approach taken by the

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, § 207 (1996) ("1996 Act").

² 1996 Act, § 207.

³ H.R. Rep. No. 204, 104th Congress, 1st Sess. 124 (1995).

Commission.⁴ The Commission then asks whether a prospective approach which relies on waivers is preferable. AlphaStar believes that such a waiver-only approach, at least as regards to small satellite dishes, would be preferable to a presumptive approach for the reasons provided in the Petition for Clarification and Further Comments submitted by the Satellite Broadcasting and Communications Association of America (“SBCA”) in the above-captioned proceeding. AlphaStar urges the Commission to adopt the waiver-only approach and other recommendations for clarification taken by the SBCA.

A waiver-only approach is preferable to the presumptive approach for a number of reasons. First, a presumptive approach encourages litigation. A State or locality has an incentive to take administrative or legal action against a dish owner in the hopes that if the dish owner chooses to fight such an action, the State or locality has an opportunity to rebut the presumption. If the dish owner decides not to fight it, then the issue remains until someone decides to spend the time and money to continue the fight against the regulation or zoning law. Either way, this threat of litigation is often enough to discourage a prospective dish owner from purchasing a DBS or other DTH system or to force a current owner to change to a more hassle-free video delivery system (i.e. cable). A State or locality could use this method of financially outlasting a dish-owner, even if they eventually lose the legal battle, to contravene the interest the federal government has in allowing consumers to have the widest available access to technology and information services.

⁴ Order, at ¶ 59.

A waiver-only system would force the issue back to the State or locality to make the initial step of first applying for a waiver with the FCC and then, if obtained, enforce it afterwards. This transfers the economic burden of going forward from the consumer, where it resides, if not intentionally, then realistically, under the presumptive approach now taken by the Commission to the State or locality where Congress decided that should be. This approach would also strengthen the ability of those States and localities which have legitimate concerns (i.e. true historic districts such as Williamsburg, Virginia) to obtain such restrictions without the necessary legal battles. Additionally, it will help those States and localities which do not wish to restrict satellite dishes to withstand the pressure from small groups within the community who do wish to restrict them.

For these reasons and those set forth by the SBCA in this matter, AlphaStar urges the Commission to adopt a waiver-only approach instead of the presumptive approach taken in the Order. AlphaStar believes that the changes to the language set forth in the Order required to implement this approach are minor and recommends that the Commission look to the proposed language changes set forth by the SBCA as a model for these changes.

III. FURTHER CLARIFICATIONS TO PROPOSED RULE

Regardless of whether or not the Commission adopts a waiver-only approach, AlphaStar believes that the Commission should clarify some aspects of its rule in order to reduce the risk for future litigation concerning these issues and to provide as complete a model as possible for States and localities when attempting to draft such laws and regulations.

A. Health Issues Concerning Receive Only Antennas

The Commission's rules, as set forth in the Order, allow for local regulations which have "clearly defined health, safety, or aesthetic objectives,"⁵ and which "furthers the stated health, safety or aesthetic objective. . . ."⁶ In the text of the Order, the Commission noted that receive-only antennas do not admit radiation and that therefore the hazard of RF emissions could not be used by a State or locality as the basis for the regulation of receive-only antennas.⁷ In order to avoid confusion and the potential for litigation on the issue, the Commission should revise its rules to clearly state that there are no health concerns with respect to receive-only antennas that will justify a State or local regulation precedence over federal regulations.

B. No Liability Prior to Commission Action

In the event that the Commission decides to maintain its current presumptive approach, AlphaStar believes that the Commission should clarify its rules to indicate that no satellite dish owner may be liable for criminal or civil penalties prior to the Commission's decision that such law or regulation has rebutted the presumption. Liability for penalties prior to the Commission determination will contradict and lessen the effectiveness of the rules by creating a disincentive to fight the law or regulation by the dish owner. The idea that he or she might legitimately fight the issue for a time, lose, and then be subject to numerous penalties for not removing the dish when the issue first arose will encourage many dish owners to remove the dish, even if only for the duration of the litigation. Worse yet, other potential dish owners might refrain from purchasing and

⁵ Order, Appendix II, § 25.104(a)(1).

⁶ *Id.* at § 25.104(a)(2).

⁷ Order, at ¶ 35. In fact, RF emissions are the only health risk from antennas raised on the record.

installing a dish until the validity of the law or regulation has been fully litigated. This is contrary to the purpose of the law and of these regulations, which is to encourage people to purchase and use these technologies. The Commission can rectify this problem by making it clear in the rules themselves that no civil or criminal penalties may be assessed until the Commission has issued a final decision rebutting the presumption.

IV. NON-GOVERNMENTAL AND PRIVATE RESTRICTIONS ON SATELLITE ANTENNAS

In the Further Notice issued simultaneously with the Order, the Commission proposed a per se preemption on non-governmental, private restrictions such as restrictive covenants and homeowners' association rules. AlphaStar supports this approach and the Commission's language in proposed section (f).⁸ This language, prohibiting the enforcement of such restrictions for dishes under one meter, will implement Congressional intent, while at the same time setting clear standards for those groups and associations who have such restrictions or are considering creating such restrictions. Standards are important for these groups and associations, whose dynamics, pitting neighbor against neighbor, are quite different than those involving State and local governments. AlphaStar urges the Commission to review the examples set forth in the SBCA's Comments filed in this proceeding to see why a pro se preemptive approach is necessary to avoid situations such as those related.

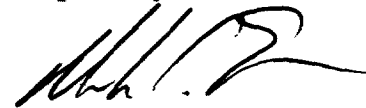
⁸ Order, at ¶ 62. The proposed paragraph reads:

- (f) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter.

C. CONCLUSION

For the reasons stated above, and for those stated by the SBCA in its Petition for Clarification and Further Comment, the Commission should adopt a waiver-only approach instead of the current presumption approach. While the presumption approach goes a long way to preventing State and local governments from restricting access to DBS and DTH technologies, a waiver-only approach will “further Congress’s special concern with DBS even more efficiently than the presumption approach”⁹ taken in the Order. In addition, the Commission should make it clear in the rules themselves that there are no health issues concerning receive only antennas that will justify State or local precedence over federal regulations and that no civil or criminal penalties may be assessed against a dish owner until the Commission has ruled that the particular law or ordinance has rebutted the presumption. Finally, the Commission should adopt the proposed paragraph (f) concerning nongovernmental and private restrictions.

Respectfully submitted,



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⁹ Order, at ¶ 59.